IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION
NOTICE OF MOTION NO.531 OF 2007
IN
SUIT NO. 338 OF 1995

Hindustan Zinc Limited ... Plaintiffs
V/s
Trafalgar House PLC ... | Defendants

Mr.R.M. Pardiwala i/b Mulla & Mulla & Craigie Blunt and Caroe for plaintiffs.

Mr. A Rajyadakshya i/b M/s. Crawford Bayley & Co. for defendants.

CORAM : A.A. SAYED, J.
DATE : 20TH DECEMBER, 2007

P.C.

1. This notice of motion has been taken out by the defendants to condone the delay and allow the defendants to file the written statement in the suit.

2. The suit is filed for recovery of a sum of Rs.7,64,95,100/- equivalent to $ 1,041,111.40 and DM 1,505,391 being the extent of alleged loss suffered by the plaintiffs due to default by the plaintiffs' Contractors viz: Davy Mackee (Stockton) Ltd., an English company, in performance of its obligations under a contract entered into between the plaintiffs and the said Contractors for basic Engineering for

Lead Zinc Smelter. The defendants have by its letter dated 17th December, 1992 given to the plaintiff at the instance of the said Contractors an Irrevocable and Unconditional Guarantee in favour of the plaintiffs in the event of any default being committed on the part of the Contractors for performance of their contract for a sum of $ 1,041,111.40 and DM 1,505,391.

3. The plaint was declared by the plaintiffs on 25th November, 1994 and filed on 25th January, 1995. Thereafter on 22nd May 1995, the defendants were served with a writ of summons. On 11th August, 1995 the Vakalatnama on behalf of the defendants was filed by the advocates. It is not disputed that on 12th January, 2000 the suit was listed before Prothonotary and Senior Master of this Court for directions and on the application of the plaintiffs the matter was adjourned for filing written statement and the matter has not been listed before the Court or the Prothonotary and Senior Master till this date.

4. It is the case of the defendants in their affidavit in support of the notice of motion that the

name of the defendants has undergone changes from time to time. The name of the defendants has changed from Trafalgar House PLC to Kvaerner PLC. Thereafter the change in name is from Kvaerner PLC to Aker Kvaerner PLC. Thereafter the name changed from Aker Kvaerner PLC to Kvaerner PLC. Thereafter from Kvaerner PLC to TH Global PLC. It is stated that TH Global PLC is registered in England and is the same entity as Trafalgar House PLC, the defendants in the above suit.

5. The defendants have stated in the affidavit in support of motion that they could not finalize and file written statement inter-alia for the reason that originally i.e. during 1994 and 1995 this matter was dealt with by the defendants' in house lawyer within the defendants' group, Mr. James Stanley. However, after the acquisition of Trafalgar House Plc by Kvaerner ASA in 1996, Mr. Stanley left the defendants' group. The matter was thereafter referred to Ms. Amy Baker, another defendants' in house lawyer. Ms. Amy Baker, however, left the defendants' group in 2002. It is further stated that the defendants' group of companies has undergone a

significant change, both in terms of its structure and personnel, details whereof are set out in paragraphs 5 (c) of the affidavit in support of the motion. It is further stated that the above restructuring has resulted in many of the defendants' group of companies ceasing to be trading entities and the previous management of such businesses being separated from the business themselves and it is therefore, mainly for this reason, that the written statement could not be filed on behalf of the defendants. It is further the case of the defendants that the details of the present proceedings came to the attention of the affiant Mr.Nigel Williams, Vice President (legal) of TH Global PLC in March 2005 and after making inquires about the status of the claims, he became aware that the written statement remained to be filed in the pending suit. He therefore, instructed M/s Pinsent Masons, Solicitors, U.K. to prepare the written statement, after taking assistance of the advocates of the defendants' on Indian Law and procedural matters. It is further the case of the defendants that it took several months for the defendants and M/s Pinsent Masons, to locate the persons concerned at the relevant time, as some

of the person had left the defendants' group and after much investigations and efforts the written statement was finalized and notarized in United Kingdom in June, 2006, and the same has been forwarded thereafter to the advocates of the defendants for filing the same in the present suit. It is further stated in the affidavit that due to the restructuring, members of the legal and commercial teams of the defendants and its business, who were originally dealing with this matter, had left the defendants. The defendants have stated that they have a good case on merits and no prejudice will be caused to the plaintiffs if the defendants are allowed to file the written statement, whereas, on the other hand, if the defendants are refused leave to file written statement, the defendants will be deprived of an opportunity to defend the suit on merits and great prejudice and irreparable harm will be caused to them.

6. The plaintiffs have filed their affidavit in reply opposing the reliefs prayed in the notice of motion. The plaintiffs take exception to the fact that the number of days of delay is not mentioned in

the Notice of Motion and it is further stated that each day of delay is required to be explained, which the defendants have failed to do. The plaintiffs in their reply have stated that the reasons for the delay in filing written statement is not justifiable in as much as Mr. Nigel Williams, who has filed his affidavit in support of notice of motion is working as the Vice President (Legal) with the defendants since June, 1988. It is further stated that Mr. Nigel Williams is a Solicitor from England and Wales and he ought to have realized the consequences of not filing the written statement in time, particularly when last opportunity was granted to them on 12th January, 2000 by the Prothonotary and Senior Master of this Court. It is stated that Advocates M/s. Crawford Bayley and Co. filed their appearance in his Court on behalf of the defendants on 11-08-95. The defendants are company being run and managed by the efficient staff, which also has a legal department. It is further stated that Mr. Nigel Williams as a responsible legal officer of the defendants ought to have realized the pros and cons of not filing the written statement. It is stated that the change in the name of the company from time

to time cannot be a ground or constitute sufficient cause for condonation of delay and that the management of the company has not changed. It is further stated that the defendants ought to have been diligent in defending the suit and should not have slept over the matter for nearly more than 11 years in filing the written statement. It is further stated that the fact that the defendants' in-house lawyers Mr. James Stanley and Ms. Amy Baker left the defendants' company could not be a ground for condonation of delay in as much as Mr. Nigel Williams was employed with the defendants' company since 1988 as Vice President (Legal) and he was duty bound to take care of all the legal matters of the defendants' company.

7. Affidavit-in-rejoinder has been filed by one Mr. Runar Nilsen, the President and CEO of the defendants company since Mr. Nigel Williams, who had affirmed the affidavit at the relevant time, left the service of defendants' company from 1st September, 2007. It is stated in the rejoinder that when the affiant became aware of the details of the case, he worked diligently with Pinset Solicitors, London,

U.K. to ensure that the written statement was prepared and couriered to the defendants' Solicitors in Mumbai for filing the same in this Court at the earliest possible opportunity and that the written statement could not be filed earlier because of circumstances beyond the control of the defendants. The defendants have reiterated the statements in their affidavit in support of the motion and denied all contrary statements in the affidavit in reply of the plaintiffs.

8. I have heard learned Counsel for the parties.

9. The learned Senior Counsel for the defendants submitted that the defendants have set out the details of restructuring of the defendants company in paragraph 5(c) of the affidavit in support of the motion after 1995, when the writ of summons was served in the above suit and also after the order dated 12th January, 2000 was passed by the Prothonotary and Senior Master. He submitted that sufficient cause has been made out to condone the delay in filing the written statement and the defendants should be given an opportunity to defend

the suit on merits. The learned Counsel further contended that Mr. Nigel William, who was at the relevant time working as Vice President (Legal) of the defendants' company had relied upon the other employees viz. Mr. James Stanley and Ms. Amy Baker, who were the in-house lawyers of the defendants' group of companies. The Ld. Sr. Counsel contended that it cannot be disputed that the defendants had undergone significant change, both in terms of its structure and personnel.

10. The Learned Sr. Counsel has invited my attention to Rule 265 of Bombay High Court, Original Side Rules, which reads as under :-

> "**265. "Power of Court or Judge to enlarge or abridge time.-** The Court or the Judge in Chambers shall have power to enlarge or abridge the time appointed by these rules or fixed by any order for doing any act or taking any proceeding, upon such terms (if any) as the justice of the case may require, and any such enlargement may be ordered although the application for the same is not made until after the expiration of the time appointed or allowed."

11. He also invited my attention to Rule 88 of the said Rules, under which 12 weeks time is prescribed for filing written statement from the date of service

of the service of summons upon the defendants.The Ld. Counsel submitted that this time can always be enlarged under Rule 265 of High Court (Original Side) Rules. He further submitted that the time prescribed under Order 8 Rule 1 does not apply as such to original side suits of this Court and for this purpose, he relied upon the case of **Iridium India Telecom Ld. V. Motorola Inc.reported in AIR 2005 S.C. 514** wherein it has been held that "the limitation for filing written statement provided under order 8 Rule 1 does not apply to suits filed on original side of the chartered High Courts."

12. The Ld. Counsel further relied upon the case of **Shaikh Salim Haji Abdul Khayumsab V. Kumar and Ors,** reported in AIR 2006 S.C. 396, wherein in para 9, 10, 11 and 12 it is observed by the Apex Court as follows:-

> "9... Order 8 Rule 1 after the amendment casts an obligation on the defendant to file the written statement within 30 days for the date of service of summons on him and within the extended time falling within 90 days. The provision does not deal with the power of the court and also does not specifically take away the power of the court to take the written statement on record though filed beyond the time as provided for. Further, the nature of

the provision contained in Order 8 Rule 1 is procedural. It is not part of the substantive law. Substituted Order 8 Rule 1 intends to curb the mischief of unscrupulous defendants adopting dilatory tactics, delaying the disposal of cases, causing inconvenience to the plaintiffs and the petitioners approaching the court for quick relief and also the serious inconvenience of the court faced with frequent prayers for adjournments. The object is to expedite the hearing and not to scuttle the same. While justice delayed may amount to justice denied, justice hurried may in some cases amount to justice buried.

"10. All the rules of procedure are the handmaid of justice. The language employed by the draftsman of processual law may be liberal or stringent, but the fact remains that the object of prescribing procedure is to advance the cause of justice. In an adversarial system, no party should ordinarily be denied the opportunity of participating in the process of justice dispensation. Unless compelled by express and specific language of the statute, the provisions of CPC of any other procedural enactment ought not to be construed in a manner which would leave the court helpless to meet extraordinary situations in the ends of justice.

"11. The morality of justice at the hands of law troubles a Judge’s conscience and points an angry interrogation at the law reformer.

"12.The processual law so dominates in certain systems as to overpower substantive rights and substantial justice. The humanist rule that procedure should be the handmaid, not the mistress, of legal justice compels consideration of vesting a residuary power in Judges to act ex debito justitiae where the tragic sequel otherwise would be wholly inequitable. Justice is the goal of jurisprudence, processual, as much as substantive."

13. Relying upon the above observations of the Apex Court, the Ld. Counsel submitted that the delay in filing written statement is required to be condoned, and that the defendants be given an opportunity as the defendants have a very good case on merits. It is also contended by him that the defendants have shown sufficient cause for condonation of delay and that no prejudice would be caused to the plaintiffs as the suit is still pending for trial. He further submitted that the defendants have not taken any steps in the matter to have the suit heard finally. He lastly stated that the defendant can be put to terms.

14. On the other hand, the learned counsel for the plaintiffs submitted that the defendants should not be granted any reliefs or shown any sympathy as more than 11 years have passed and the defendants have not been diligent in the matter and have not filed their written statement and the defendants have delayed the process of this Court by not filing the written statement in time, deliberately and with ulterior motives. The learned Counsel for the plaintiffs has further contended that in view of long delay the

Court should reject this notice of motion of the defendants. He submitted that the concerned person Mr.Nigel Williams has through out been in association with the defendants and he being the Vice President (Legal) of the Company in charge of the legal department and also a Solicitor and knowing his responsibility and consequences of not filing written statement in time, he ought to have acted with the diligence. He submitted that the defendants have not made out case to condone the delay in filing the written statement.

15. The learned Counsel for the plaintiffs relied upon the case of **D. Gopinathan Pillai V. State of Kerala and Anr.,** reported in (2007) 2 SCC 322 wherein the Hon'ble Supreme Court set aside the order passed by the Trial Court and the High Court and held that the delay of 3320 days was not properly, satisfactorily and convincingly explained and the Court cannot condone the delay, only on the sympathetic ground. The Ld. Counsel for the plaintiff also relied upon the case of **Sitaram Ramchandra and Ors. V. M.N. Nagrashana,** reported AIR 1960 S.C. 260 wherein it is observed by the Apex

Court that it cannot be disputed that in dealing with the question of condoning delay under Section 5 of the Limitation Act the party has to satisfy the court that he had sufficient cause for not preferring the appeal or making application within the prescribed time, and this has always been understood mean that the explanation has to cover the whole of the period of delay. The Ld. Counsel further submitted that even in the writ of summons served on the defendants, it is mentioned that the written statement should be filed within three months. It is therefore, urged that the notice of motion be dismissed with costs.

16. The short point which arises for my consideration is.- Whether the delay in filing the written statement should be condoned or not?

17. In the instant case, it is noted that at the threshold i.e. when the suit was filed in 1995, the provisions of CPC prior to the amendment of 1999 and 2002 were in existence. It is only by amendment of 2002, whereby strict construction of the time prescribed for filing of the written statement i.e. within 30 days and not later than 90 days for reasons

to be recorded in writing, came into force. It is further noted that the directions to file written statement was given by order dated 12th January 2000 of the Prothonotary and Senior Master of this Court. The Written Statement was however, not filed within the time granted by the Prothonotary and Senior Master.

18. From a perusal of the Affidavits and the submissions made by the Ld. Senior Counsel on behalf of the defendants, it is seen that there was substantial restructuring of the defendants company at different times and the name of the defendants company has also changed several times. It is not disputed that Mr.Nigel Williams, who was also the Vice President (legal) was associated with the defendants' company, atleast until the filing of the above Notice of Motion; however this by itself would not be a ground to come to the conclusion that the defendants have failed to file written statement on account of negligence, or that the same was done deliberately or with ulterior motives. The said Mr. Nigel Williams, has filed his affidavit in support of the motion himself and set out the reasons and

explanation for the delay including the fact that the defendants were relying upon other persons who have left the Company at different times on account of restructuring of the Company and the names of the said persons viz: Mr. James Stanley and Ms. Amy Baker, are also stated in the affidavit. The affidavit in para 5 (c) spells out the details and particulars of the changes and restructuring and changes undergone by the defendants.

19. It is further pertinent to note that since the said order dated 12th January 2000 passed by the Prothonotary and Senior Master, no further orders are passed or directions given under Order 8 Rule 10 of CPC for pronouncement of Judgment nor any order is passed in relation to the suit. Neither are any directions given or orders are passed under Rule 89 of The Bombay High Court (Original Side) Rules for transferring the suit to the list of undefended suits. Further, no Application is made by the plaintiffs by filing any Notice of Motion for judgment for want of written statement under Rule 90 of The Bombay High Court (Original Side) Rules. The matter, as it appears, has not moved an inch and has

not been listed either before the Prothonotary and Senior Master or before the Court and undisputedly the plaintiffs have not taken any steps in that regard. Moreover considering the case of **Iridium India Telecom Ltd. V. Motorola Inc.** (supra) cited by the Ld. Counsel for the defendants, the provisions of The Bombay High Court (Original Side) Rules, would prevail over the provisions of CPC and the time or extended time prescribed under CPC would not be strictly applicable in the instant case and the time for filing of the written statement can always be extended by Court as provided in Rule 265 of the said Rules.

20. In any event, even under the amended CPC, the law laid down for extension of time in filing the written statement is no longer res integra. A 3-Judge Bench of the Hon'ble Supreme Court in the case of **Kailash vs. Nankhu & Ors.** reported in 2005 (4) S.C.480, has held that the time prescribed under the amended CPC can be extended in exceptional circumstances and further observed as follows:

> " The purpose of providing the time schedule for filing the written statement under Order 8

> Rule 1 CPC is to expedite and not to scuttle the hearing. The provision spells out a disability on the defendant. It does not impose an embargo on the power of the court to extend the time. Though the language of the proviso to Rule 1 Order 8 CPC is couched in negative form, it does not specify any penal consequences flowing from the non-compliance. The provision being in the domain of the procedural law, it has to be held directory and not mandatory. The power of the court to extend time for filing the written statement beyond the time schedule provided by Order 8 Rule 1 CPC is not completely taken away. Though Order 8 Rule 1 CPC is a part of procedural law and hence directory, keeping in view the need for expeditious trial of civil causes which persuaded Parliament to enact the provision in its present form, it is held that ordinarily the time schedule contained in the provision is to be followed as a rule and departure therefrom would be by way of exception. A prayer for extension of time made by the defendant shall not be granted just as a matter of routine and merely for the asking, more so when the period of 90 days has expired. Extension of time may be allowed by way of an exception, for reasons to be assigned by the defendant and also be placed on record in writing, howsoever briefly, by the court on its being satisfied. Extension of time may be a lowed if it is needed to be given for circumstances which are exceptional, occasioned by reasons beyond the control of the defendant and grave injustice would be occasioned if the time was not extended. Costs may be imposed and affidavit or documents in support of the grounds pleaded by the defendant for extension of time may be demanded, depending on the facts and circumstances of a given case."

21. In case of **Debjani Mishra vs. Uttam Kumar Mishra reported in (2004) 13 SCC 627**, the Apex Court

considering the fact that it was dealing with a matrimonial dispute, was pleased to observe that the High Court could not have refused to take the written statement on file and that even if the written statement had been filed beyond time, the suit would not have reached hearing for number of years and the appropriate orders should be to direct payment of costs and if necessary, a high amount.

22. Considering the above judgments and the judgments relied upon by the Ld. Counsel for the defendants, it is clear that the power of the Courts in permitting the fling of the written statement in exceptional cases beyond the prescribed period is not taken away by the amended Act of 2002.

23. In so far as the judgments relied upon by the Ld. Counsel for the plaintiffs are concerned, in my view, the same would not be applicable to the facts of the present case. In the case of **D. Gopinathan Pillai vs. State of Kerala & Anr.** (supra) no explanation was given for the delay of 3320 days in filing the petition to set aside the award under the Arbitration Act 1940, and the principal sub-judge and

the High Court had condoned the delay without assigning any reasons and the Hon'ble Supreme Court, therefore set aside the orders passed by the sub-judge and the High Court. In **Sitaram Ramcharan & Ors. vs. M.N. Nagrashana** (supra) also, the applicants therein had failed to explain the delay in filing their application u/s 15 (2) of Payments of Wages Act for preferring Appeals and the principal question before the High Court and the Authority was whether ignorance of law can be said to constitute sufficient cause. In the instant case however, the defendants have set out detailed explanation in their affidavit in support of the motion for the delay in filing their written statement.

24. Considering the facts and circumstances of the case, I am satisfied that the defendants have shown sufficient cause and made out an exceptional case for condonation of delay in filing the written statement and the grounds for the delay given by the defendants are good and valid. I am further satisfied that there was no gross negligence or any dilatory tactics adopted by the defendants to delay the filing of the written statement and that the defendants ought to be

given an opportunity to file their written statement by enlarging the time prescribed under the law. In my view, in the peculiar facts of the present case, no prejudice would be caused to the plaintiffs if the defendants are allowed to file their written statement and participate in the trial of the suit, subject however to imposition of costs upon the defendants for the delay of 11 years in filing the written statement. I am of the view that the interest of justice would be served by condoning the delay and taking the written statement of he defendants on record. Hence, I pass the following order :

ORDER

25. Notice of Motion is made absolute in terms of prayer clauses (a) and (b) subject to payment of costs of Rs. 50,000/- (Rupees Fifty Thousand) to be paid by the defendants to the plaintiffs. Prayer clauses (a) and (b) of the Notice of Motion read thus-

"(a) This Hon’ble Court be pleased to condone the

delay in filing the Written Statement;

(b) This Hon'ble Court be pleased to allow the Defendants to file their Written Statement in Suit No. 338 of 1995;"

26. Written statement to be filed within two weeks. Costs would be condition precedent to filing of the written statement.

27. The operation of this order is stayed for a period of four weeks.

(A.A.SAYED, J)